Supreme Court, U.S.
FILED
AUG 23 1999
OFFICE OF THE CLERK

No. 99 328

IN THE
SUPREME COURT OF THE UNITED STATES

THE CITY OF NEW YORK, and RUDOLPH GIULIANI, as Mayor of the City of New York,

Petitioners,

- against -

THE UNITED STATES OF AMERICA, and JANET RENO, as Attorney General of the United States,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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August 10, 1999

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QUESTION PRESENTED

Do section 434 of the Welfare Reform Act and section 642 of the Immigration Reform Act violate the Tenth Amendment and principles of federalism by prohibiting State or local governments from restricting, pursuant to statutes enacted in furtherance of their police powers, their agencies and employees from divulging government information regarding immigration status of individuals to the Immigration and Naturalization Service?

PARTIES TO THE PROCEEDING

The parties to this case when it commenced were as follows:

1. The City of New York, plaintiff.

2. Rudolph Giuliani, in his official capacity as Mayor of the City of New York, plaintiff.

3. The United States of America, defendant.

4. Janet Reno, in her official capacity as Attorney General of the United States of America, defendant.

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No.

IN THE
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THE CITY OF NEW YORK, and RUDOLPH GIULIANI, as Mayor of the City of New York,

Petitioners,

- against -

THE UNITED STATES OF AMERICA, and JANET RENO, as Attorney General of the United States,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners, the City of New York and Rudolph Giuliani, as Mayor of the City of New York, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-titled matter on May 27, 1999.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, dated May 27, 1999, is reprinted in the Appendix at page 1. Its citation is 179 F.3d 29 (2d Cir. 1999). The opinion of the United States District Court for the Southern District of New York, dated July 18, 1997, is reprinted in the Appendix at page 53. Its citation is 971 F. Supp. 789 (S.D.N.Y. 1997).

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit sought to be reviewed was dated and entered on May 27, 1999. The jurisdiction of this Court is invoked under the provision 28 U.S.C. § 1254(1). This petition has been filed within the time allowed by law.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The United States Constitution

Tenth Amendment

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or the people.

Executive Order No. 124 which, in relevant part, provides:

> **Section 2. Confidentiality of Information Respecting Aliens.**
>
> a. No City officer or employee shall transmit information respecting any alien to federal immigration authorities unless
>
> (1) such officer's or employee's agency is required by law to disclose information respecting such alien, or
>
> (2) such agency has been authorized, in writing signed by such alien, to verify such alien's immigration status, or
>
> (3) such alien is suspected by such agency of engaging in criminal activity, including an attempt to obtain public assistance benefits through the use of fraudulent documents.
>
> b. Each agency shall designate one or more officers or employees who shall be responsible for receiving reports from such agency's line workers on aliens suspected of criminal activity and for determining, on a case by case basis, what action, if any, to take on such reports. No such determination shall be made by any line worker, nor shall any line worker transmit information respecting any alien directly to federal immigration authorities.

c. Enforcement agencies, including the Police Department and the Department of Correction, shall continue to cooperate with federal authorities in investigating and apprehending aliens suspected of criminal activity. However, such agencies shall not transmit to federal authorities information respecting any alien who is the victim of a crime.

Section 3. Availability of City Services to Aliens.

Any service provided by a City agency shall be made available to all aliens who are otherwise eligible for such service unless such agency is required by law to deny eligibility for such services to aliens. Every City agency shall encourage aliens to make use of those services provided by such agency for which aliens are not denied eligibility by law.

Section 434 of the Welfare Reform Act is reproduced at Appendix, pages 97-98.

Section 642 of the Immigration Reform Act is reproduced at Appendix, pages 98-99, and at pages 6-7 of this petition.

STATEMENT OF THE CASE

In response to an extensive City-wide study, published in August, 1989, by the City of New York Commission on Human Rights, which disclosed widespread discrimination against immigrants, both legal and undocumented, in employment, housing and public accommodations and found that many immigrants were reluctant to speak out about their problems because they feared deportation for having cooperated with a government agency, Mayor Edward Koch issued Executive Order No. 124 that same month, which articulated the "City Policy Concerning Aliens" (95).[1] Both of Mayor Koch's successors, David N. Dinkins and the City's current Mayor, Rudolph W. Giuliani, reissued Executive Order No. 124, which prohibits City employees from transmitting information gathered by City employees and agencies respecting any alien to federal immigration authorities except under certain circumscribed conditions (95).

On August 22, 1996, the Welfare Reform Act was signed into law. Section 434 of the Act, entitled "Communication between State and Local Government Agencies and the Immigration and Naturalization Service," provides that no State or local government entity may be prohibited or restricted from communicating with the INS regarding the immigration status of aliens (97-98). As explained in the Conference Report to the bill, the provision "is designed to prevent any State or local law, ordinance, executive order, policy, constitutional provision, or decision of any Federal or State court that prohibits or in any way restricts any communication between State and local

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[1] References in parentheses refer to pages of the Appendix.

officials and the INS." H.R. Conf. Rep. No. 725, 104th Cong., 2d Sess, 383 (1996), reprinted in 1996 U.S.C.C.A.N. 2649, 2771.

On September 30, 1996, the Immigration Reform Act was signed into law. Section 642 of the Act, entitled "Communications Between Government Agencies and the Immigration and Naturalization Service," provides in relevant part:

> (a) IN GENERAL. -- Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.
>
> (b) ADDITIONAL AUTHORITY OF GOVERNMENT ENTITIES. --
>
> Notwithstanding any other provision of Federal, State, or local law, no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual:
>
> (1) Sending such information to, or requesting or receiving such information

from, the Immigration and Naturalization Service.

(2) Maintaining such information.

(3) Exchanging such information with any other Federal, State, or local government entity.

(c) OBLIGATION TO RESPOND TO INQUIRIES. -- The Immigration and Naturalization Service shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information.

On October 11, 1996, the City of New York commenced an action for declaratory and injunctive relief challenging the constitutionality of section 434 of the Welfare Reform Act and section 642 of the Immigration Reform Act and setting forth three causes of action (20-43).

First, by prohibiting the City from issuing executive orders, enacting legislation, or otherwise making policy regarding the reporting of undocumented aliens by City officials, sections 434 and 642 have commandeered the City's legislative and executive policymaking apparatus, diminishing political accountability and violating the Tenth Amendment and principles of federalism (37-39). The Tenth Amendment provides that "[t]he powers not delegated

to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Second, sections 434 and 642, which are directed only at States and localities and not at private individuals, interfere with core functions of City government, including its ability to exercise police powers to provide for public health and safety and to control its own workforce, in violation of the Tenth Amendment and principles of federalism (40-41).

Third, sections 434 and 642 interfere with the ability of states and local governments and their duly-elected officials to represent the electorate by engaging in the sovereign process of passing legislation or otherwise enacting a policy that prohibits or restricts their officials from sending information to the INS, in violation of the Guarantee Clause (41-42). The Guarantee Clause provides that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government . . ." U.S. Const., Art. IV, § 4.

The policy embodied in Executive Order No. 124 is evident: "undocumented aliens who are witnesses to or victims of crime must not be deterred from coming forward for fear of deportation, nor should undocumented aliens who are infected with contagious diseases be deterred from seeking treatment, nor should undocumented alien children be afraid to attend public schools and forfeit their right to an education. The safety and public health of the entire City are dependent on all residents, regardless of their immigration status, cooperating with the government and securing government services to which they are entitled."

Executive Order No. 124 also ensures that "City officials, who do not have the expertise or authority to determine immigration status, are not put in the position of being permitted to determine that status and to report those ad hoc, inaccurate and inconsistent determinations to the INS [the Immigration and Naturalization Service]."

The City stated that, as of October 1992, the Immigration and Naturalization Service estimated that there were 449,000 undocumented aliens residing in New York State and that this population was growing at the rate of 41,000 annually (24-25).[2] Thus, as of October 1993, there were an estimated 490,000 undocumented aliens living in this State, approximately 80% (i.e., 400,000) of whom resided in New York City. A study published by the Urban Institute in 1994 estimated that, as of October 1993, 21.6% of the total number of undocumented aliens residing in New York State were of school age (i.e., approximately 85,000 children) (25).

More than 4,000 undocumented aliens who pass through City jails every year are reported to INS, but only approximately two to three hundred of these immigrants are deported annually (26). The Immigration and Naturalization Service has deported almost no undocumented aliens residing in this City who are not convicted criminals. Law-abiding undocumented aliens are among the City's long-term residents and are part of the fabric of this City (26).

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[2] These estimates were published in the 1993 Statistical Yearbook of the Immigration and Naturalization Service (9).

The concentration of undocumented aliens is particularly high in neighborhoods where new, legal immigrants have settled (27). This is because many families are comprised of legal aliens, undocumented aliens, and United States citizens. The intermingling of undocumented aliens with other residents throughout the City, including in public schools, day care centers, playgrounds, and public transportation, has profound consequences for the public health and safety of the entire City (27).

Many childhood diseases are highly contagious and, if left untreated, will infect other children (29). Moreover, undocumented aliens often make up essential links in the investigative chain necessary for the New York City Department of Health to trace outbreaks of contagious diseases, such as tuberculosis, sexually transmitted diseases, and other public health problems (29). If undocumented aliens are reluctant to cooperate with public health officers for fear of being reported to the INS, the health of all City residents is jeopardized.

Children deprived of an education will be more likely to turn to crime. Immigrant children, many of whom will eventually legalize their status, will have great difficulty finding employment in the future. These residents, consequently, will be precluded from contributing to the City's economy, and may become dependent on public assistance (29).

As a result of their undocumented status, immigrants are particularly vulnerable to victimization (28). If the City cannot guarantee undocumented aliens, who are victims or witnesses or crimes, that their immigration status will not

be disclosed to the INS, the ability of law enforcement officers to fight crime will be undermined to the detriment of all residents.

On January 10, 1997, the United States served its answer and asserted, inter alia, that the City's action was barred by the Supremacy Clause of the Constitution, Art. VI, cl. 2, 3 (45-51).

On February 7, 1997, both parties simultaneously moved for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

DECISIONS BELOW

(1)

In granting the federal government's motion for judgment on the pleadings and dismissing the City's three causes of action, the District Court acknowledged that "the Tenth Amendment and the principles of Federalism inherent in the structure of the Constitution limit the ways in which Congress can require action by the states in pursuit of federal policies" (67). However, Congress may encourage a state to regulate in a particular way or to provide incentives to the states as a method of influencing a state's policy choices, or may pass appropriate legislation in areas of federal concern that preempts contrary state laws" (69).

The Court concluded that sections 434 and 642 "do not require the City to legislate, regulate, enforce, or otherwise implement federal immigration policy. Instead, they direct only that City officials and agencies be allowed, if they so choose, to share information with federal

authorities. The statutes do not even require any City official to provide any information to federal authorities. They only prevent the City from interfering with a voluntary exchange of information. Although the statutes can be characterized as interfering with a City policy that prevents its officials from cooperating with federal immigration authorities except in accordance with certain procedures, that effect on local policy is not the type of intrusion that is sufficient to violate the Tenth Amendment or principles of federalism" (72-73). The Court stated that the challenged provisions "are even less intrusive on state sovereignty than those mandatory reporting statutes whose validity the Supreme Court explicitly refrained from deciding" (75) in Printz v. United States, __ U.S. __, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997).

The Court further concluded that "although political accountability is a basis for concluding that Congress lacks the power to compel the states to regulate or to conscript state and local officials in carrying out a federal program, political accountability standing alone is not a basis for invalidating a Congressional statute that does not implement a federal program in an impermissible way" (77).

In also dismissing the second cause of action, the Court rejected the City's contention that a substantive analysis under the Tenth Amendment survives, Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), when legislation is directed solely at states or local governments.

The Court of Appeals, noting the substantial burden that the City bears in a facial challenge to a legislative Act, treated two aspects of the City's Tenth Amendment argument seriatim, i.e., that the scope of state sovereignty includes the power to choose not to participate in federal regulatory programs, which includes the power to forbid state or local agencies, officials and employees from voluntarily aiding such programs, and that the federal government may not use its power to legislate in an area to disrupt the actual operation of state or local government (10).

Noting the City's scope-of-state-sovereignty argument relies principally upon Printz v. United States, __ U.S. __, 117 S.Ct. 2365 (1997), and New York v. United States, 505 U.S. 144 (1992), the Court chose "not to read these cases so broadly" (11). "The central teaching of these cases is that 'even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts' [citing New York v. United States, 505 U.S. at 166]" (11). Distinguishing Printz and New York from the instant case, the Court found no federal compulsion nor the affirmative conscription of states, localities or their employees into federal government service.

The Court viewed the City's argument as a request "to turn the Tenth Amendment's shield against the federal government's using state and local governments to enact and administer federal programs into a sword allowing states and localities to engage in passive resistance that

frustrates federal programs" (12-13). Relying upon the Supremacy Clause, "which bars states from taking actions that frustrate federal laws and regulatory schemes," the Court held that the states do not retain an untrammeled right to forbid all voluntary cooperation by state and local officials with particular federal programs (13). In view of the City's facial challenge to the statutes and the Executive Order's mandatory non-cooperation directive relating to a particular federal program, the Court found no need to locate the line between invalid federal measures and valid measures that prohibit states from compelling passive resistance (13-14).

Next, the Court dealt with the City's argument that the statutes violate the Tenth Amendment because they interfere with local government operations by regulating both the use of confidential information acquired by the local government in the course of its official business and by regulating the scope and nature of local government employees regarding such information (14). The City's concerns in this regard are "not insubstantial" (15) The Court recognized that obtaining information essential to a wide variety of governmental functions may be difficult or impossible without an expectation of confidentiality; that preserving confidentiality in turn requires local government's regulation of the use of information by its employees; and that the challenged regulation of the use of information by its challenged statutes undeniably interfere with the City's control, both over the information and over its employees' use of such information (15-16).

The Court held, however, that the City's facial challenge, resting, as it does, solely upon the Executive Order, is insufficient to demonstrate an impermissible

intrusion of local control of information obtained in the course of official business (16).

The Court stated that, at oral argument, it invited the City to inform the Court whether the information covered by the Executive Order might be subject to other confidentiality provisions that would prevent dissemination generally. Since, in the Court's view, the extensive material and commentary provided by the City was insufficient to enable the Court to determine whether the challenged statutes were more intrusive than when viewed from the perspective of the Executive Order alone, it limited its inquiry solely to the facial effect of the statutes on the Executive Order. In that circumscribed context, the Court upheld the constitutionality of Sections 434 and 642, relying upon its analysis relating to the power of the states to command passive resistance to federal programs (17).

The Court, for the same reasons stated above, rejected the City's argument that the offending sections violate the Constitution's Guarantee Clause, U.S. Constitution, Art. IV, § 4 (18).

REASONS FOR GRANTING THE WRIT

THIS CASE PRESENTS AN IMPORTANT QUESTION OF LAW CONCERNING THE TENTH AMENDMENT GUARANTEE OF SOVEREIGNTY TO LOCAL GOVERNMENT AND THE FEDERAL GOVERNMENT'S INFRINGEMENT UPON THAT SOVEREIGNTY BY ITS UNCONSTITUTIONAL INTERFERENCE WITH THE LOCAL GOVERNMENT'S LEGISLATIVE PROCESS AND THE EXERCISE OF ITS POLICE POWERS.

In New York v. United States, 505 U.S. 144 (1992), this Court held that Congress cannot compel the States to enact or enforce a federal regulatory program without violating the Tenth Amendment. In Printz v. United States, __ U.S. __, 117 S.Ct. 2365 (1997), the Court held that Congress cannot circumvent that prohibition by conscripting the State's officers directly. "[S]uch commands are fundamentally incompatible with our constitutional system of dual sovereignty." Printz, 117 S.Ct., at 2384. We submit that, in the instant case, the United States violated the Tenth Amendment by interfering with the City's control of its employees and the information those employees gather; by disrupting the City's legitimate exercise of its police power; and by interfering with the integrity of the City's legislative process.

The Welfare Reform Act of 1996 and the Immigration Reform Act of 1996, to the extent that they

directly regulate immigration, an area reserved by the Constitution to the federal government, preempt the field from regulation by the states or local governments. Section 434 of the Welfare Reform Act and section 642 of the Immigration Reform Act, however, violate the Tenth Amendment and principles of federalism by unconstitutionally interfering with the local government's legislative process and the exercise of its police powers. The exercise of police powers to protect the health, safety, good order and general welfare of the people is the chief purpose of local government, and has never been surrendered to the federal government. See Kovacs v. Cooper, 336 U.S. 77, 83 (1949). Police powers are inherent in the States and their political subdivisions, reserved to them by the Constitution, and necessary to their existence as separate and independent governments. How much the preservation of health, prevention of crime and protection of the general welfare demand the restriction or prohibition of certain activities is a matter to be determined by the representatives of local government upon their own views of public policy, taking into consideration local knowledge and experience in dealing with the needs of a heterogeneous population such as in the City of New York.

The City of New York exercised its sovereign power to make the policy choices embodied in Executive Order No. 124 through its political process. It was promulgated not from any attempt to regulate immigration or to interfere with matters entrusted to Congress by the Constitution. Rather, this Executive Order was issued to protect the health, safety and well-being of all New York City residents by assuring the confidentiality of law-abiding immigrants, many of whom were not seeking medical attention, reporting crimes, or sending their children to school for

"fear that any contact with a government agency will bring them to the attention of federal immigration authorities." See Statement of Basis and Purpose of Executive Order (107).

In New York City, undocumented aliens mix with other residents in all walks of life, including public schools, day care centers, playgrounds, and public transportation. The health, safety and future of this City are dependent on all residents, regardless of their immigration status, seeking medical treatment for contagious diseases, reporting crimes and sending their children to school. As a matter of public policy for the commonweal, undocumented aliens should not be discouraged from attending to these important matters for fear that City employees, while functioning in their official capacity as health care officials, police officers, and school teachers, will report them to the Immigration and Naturalization Service.

The Court of Appeals recognized the City's dilemma and found its concerns to be substantial. It stated (15-16):

> The obtaining of pertinent information, which is essential to a wide variety of state and local government functions, may in some cases be difficult or impossible if some expectation of confidentiality is not preserved. Preserving confidentiality may in turn require that state and local governments regulate the use of such information by their employees. Finally, it is undeniable that Sections 434 and 642 do interfere with the City's control over confidential information obtained in the course of municipal business

and over its employees' use of such information.

The City provides confidentiality protection to much of the information it gathers pursuant to the exercise of its police powers. See, e.g., N.Y. Social Services Law, § 136 (Confidentiality of records concerning Protection of Public Welfare records); N.Y. Social Services Law, § 372 (Confidentiality of records concerning Care and Protection of Children); 4 New York Code of Rules and Regulations, § 83.5 (Confidentiality of medical records); N.Y. Public Officers Law, § 87 (Access to agency records); 12 Rules of the City of New York § 1-102 (Confidentiality of information obtained by Commission on Human Rights). Since the City has no authority or regulatory power in the area of immigration, it does not have a statute or regulation specifically guaranteeing the confidentiality of information concerning immigration status, except for Executive Order 124. The reach of the order is, however, very broad in that it extends to all of the many areas in which the City's police power operates and where information concerning an individual's immigration status may tangentially arise or where an individual may be reluctant to impart vital information for fear that his or her status might be detected and revealed to the federal authorities. The confidentiality does not, moreover, operate only against the federal immigration authority, although it is obviously the only source of concern to an individual with a questionable immigration status. The sole rational interpretation of the Executive Order in view of the stated purpose for its promulgation is that it protects information concerning immigration status from revelation to anyone, unless one of the exceptions is applicable. See Statement of Basis and Purpose of Executive Order (107).

We submit that such an intrusion by Congress destabilizes the balance sought to be achieved in our federal system by the Tenth Amendment and we, therefore, petition this Court to right that delicate balance. The Court has already granted a writ of certiorari to the Court of Appeals for the Fourth Circuit in Condon v. Reno, 155 F.3d 453 (4th Cir. 1998), cert. granted, __ U.S. __, 119 S. Ct. 1753 (1999), where the Court of Appeals held that the Driver's Privacy Protection Act violated the Tenth Amendment. The DPPA exclusively regulates the disclosure of information contained in state motor vehicle records and effectively prevents the States from disclosing such information if it chooses. The instant case presents the mirror image of the constitutional violation in Condon v. Reno, because here the United States enjoins the City of New York from preventing its employees from disseminating information belonging to the City. There is, moreover, a conflict between the holding of Condon and that of the instant case. Granting a writ of certiorari to the Second Circuit here would present the Court with the opportunity to review these Tenth Amendment issues in a more comprehensive manner.

A. Congress has no power under the Constitution to enact sections 434 and 642.

Sections 434 and 642 were "designed to prevent any State or local law, ordinance, executive order, policy, constitutional provision, or decision of any Federal or State court that prohibits or in any way restricts any communication between State and local officials and the INS." H.R. Conf. Rep. No. 725, 104th Cong., 2d Sess. 383 (1996), reprinted in 1996 U.S.C.C.A.N. 2649, 2771. The People of the States did not, however, confer authority

upon Congress to subordinate their health, safety and well-being to the regulation of immigrants in accordance with congressionally-imposed rules. No matter how strong the federal interest may be, the Constitution simply does not give Congress the authority to conduct its business in a fashion that inflicts injury upon the public, or to obstruct the operations of municipal government directed at protecting the public. The power of Congress to regulate immigration was not intended as an authority to control local governments in the exercise of their police powers over local matters, always existing and carefully reserved to them in the Tenth Amendment.

Local government's power to protect its residents and Congress's power to regulate immigration are essential to both governments and must stand together. These twin powers, which are exclusive, distinct and independent, will act as mutual restraints only if both are credible. Gregory v. Ashcroft, 501 U.S. 452, 457 (1991); see Printz v. United States, __U.S.__, 117 S.Ct. 2365, 2377 (1997) ("local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere," quoting Madison, The Federalist No. 39, at 245); Texas v. White, 74 U.S. 700, 725 (1868) ("The preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States").

Congress has no general police power; it may exercise a police power only incident to some authority expressly delegated to it by the Constitution. See United States v. Lopez, 514 U.S. 549, 584-85 (1995) (Thomas, J., concurring)("the Federal Government has nothing approaching a police power"). It is only when Congress acts within its enumerated powers, and a federal regulation and countervailing State or local interests cannot be reconciled or consistently stand together, that the local interests must yield to the federal government under the Supremacy Clause. See Maryland v. Wirtz, 392 U.S. 183, 196 (1968). That is not, however, the case here.

The Court of Appeals invoked the Supremacy Clause as the source of federal authority to enact sections 434 and 642. Art. VI, cl. 2 (25). The Supremacy Clause, however, makes the "Law of the Land" only "Laws of the United States which shall be made in Pursuance [of the Constitution]." Printz v. United States, supra, 117 S.Ct., at 2379. In the instant case, the Supremacy Clause merely brings us to the question of whether these provisions "violate State sovereignty and are thus not in accord with the Constitution." Id.

The statutes at issue do not constitute a lawful assertion of congressional authority over the process of naturalization, or the regulation of commerce among the States, or foreign affairs, but an invasion by the federal government into a local sovereign matter, and over which no authority has been delegated to Congress under the Constitution. It does not follow that Congress's powers to perform these functions authorize its interference with State and local autonomy. The fear of this precise danger -- that Congress would devour the essence of State sovereignty --

is what mobilized the States to demand the Tenth Amendment.

In conferring upon Congress the power to regulate immigration, there was no intent on the part of the Framers of the Constitution to preclude State and local governments from enacting policy with respect to the health, welfare and safety of its residents, though the policy might indirectly affect the objectives of Congress to regulate immigrants, lawful or unlawful. In the instant case, Congress seeks to regulate immigration in a far-reaching and impermissible way.

In rejecting an analogous intrusion by Congress under the Commerce Clause, this Court held that the Gun-Free School Zones Act, which made it a federal offense for any individual knowingly to possess a firearm at a place that the individual knows or has reasonable cause to believe is within a school zone, violated the Tenth Amendment. United States v. Lopez, supra, 514 U.S. 549. The Court recognized that the Act exceeded Congress's Commerce Clause authority, since possession of a gun in a local school zone was not an economic activity that substantially affected interstate commerce. United States v. Lopez, supra, 514 U.S., at 556-57. The Court stated that "[t]o uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." United States v. Lopez, supra, 514 U.S., at 567. The Court made clear that "the scope of the interstate commerce power 'must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and

remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.'" United States v. Lopez, supra, 514 U.S., at 557, quoting NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

In enacting sections 434 and 642, Congress has engaged in legislative legerdemain in an attempt to fashion its will to meet constitutional muster. Under the guise of regulating immigration, Congress seeks to displace the policy decisions of State and local governments in the exercise of their police powers, and to control the conduct and daily activities of their officials -- not as private citizens, but as employees of State and local governments -- to fulfill the purposes of Congress.

B. Sections 434 and 642 deprive the City of New York of the essence of its sovereign power to protect the health, safety and welfare of the people, interfere with its internal policies and affairs, and obstruct and burden its governmental operations, under the guise of regulating immigration.

Executive Order No. 124 directs City employees, while acting in their official capacity in City-created agencies, to maintain the confidentiality of law-abiding immigrants, whose open and honest communications are essential to the preservation of health, prevention of crime and the protection of the public welfare. This information belongs to the City and is available to City employees only in their official capacity. The Mayor has the power to establish a policy prohibiting City employees, who do not

have the expertise or authority to determine immigration status, to make ad hoc decisions regarding that status. There is also no question that the Mayor may forbid City employees from using City time, resources, and information gathered by the City to report law-abiding immigrants to INS.

The New York City Charter expressly provides that the Mayor, as the chief executive officer, "shall be responsible for the effectiveness and integrity of city government operations and shall establish and maintain such policies and procedures as are necessary and appropriate to accomplish this responsibility including the implementation of effective systems of internal control by each agency and unit under the jurisdiction of the mayor." N.Y.C. Charter §§ 3 & 8(a). The City Council is "vested with the legislative power of the city." N.Y.C. Charter § 21.

Sections 434 and 642 prohibit the Mayor and the City Council from exercising their executive and legislative powers and responsibilities in accordance with the policies and priorities of local government. The power to set policy and to regulate its own internal procedures is what gives local government its sovereign nature. This includes the ability to control City employees and to assign their duties. See Koog v. United States, 79 F.3d 452, 460 (5th Cir. 1996) ("Whatever the outer limits of state sovereignty may be, it surely encompasses the right to set the duties of office for state-created officials and to regulate the internal affairs of governmental bodies"), cert. denied sub. nom. United States v. Gonzalez, 117 S.Ct. 2507 (1997); Romero v. United States, 883 F.Supp. 1076, 1086 (W.D. La. 1995) (State has sovereign right to maintain order by "defining and assigning the duties of its sheriffs").

The City of New York does not seek immunity from a regulation that is otherwise within Congress's powers to regulate immigration. The challenged provisions do not constitute a lawful assertion of congressional authority over immigration or over interstate commerce pursuant to the Commerce Clause, but an invasion by the federal government over a local sovereign matter, and over which no authority has been delegated to Congress in conferring the power to regulate commerce among the States.

C. By acting to control State and local officials and agencies rather than regulating immigration itself, Congress has subjected State and local governments to federal direction.

This Court has made clear that States and their political subdivisions "are not subject to federal direction" (emphasis in original). Printz v. United States, supra, 117 S.Ct. at 2373; New York v. United States, 505 U.S. 144, 162 (1992) (the Constitution does not "confer upon Congress the ability to require the States to govern according to Congress' instructions").

The view that sections 434 and 642 do not violate the Tenth Amendment and principles of federalism because "[t]hese Sections do not directly compel states or localities to require or prohibit anything" does not withstand scrutiny. The whole object of sections 434 and 642 is to prevent state and local governments from exercising control over their own employees and their own property in the form of information. The language of these provisions makes evident that the federal government seeks a direct exchange of information between State and local employees and INS

regarding the "immigration status, lawful or unlawful, of any individual." This exchange of information is to occur without any interference from the "middle man," i.e., the State or municipal employer.

Congress is doing indirectly what it cannot do directly. The federal government's power would be augmented immeasurably and impermissibly if it were able to impress into its service -- and at no cost to itself -- any percentage of the millions of State and municipal employees of the 50 States. See Printz v. United States, supra, 117 S.Ct., at 2378. Given the current anti-immigrant sentiment in certain segments of the population, INS will, no doubt, have plenty of State and local assistance in performing its job. The constitutional problem, however, is that State and local employees cannot be enlisted as the agents, spies or foot soldiers of the federal government. When Congress desires to regulate in areas where it has authority under the Constitution, it must do so directly and cannot conscript State and local governments to do its bidding. See Printz v. United States, supra, 117 S.Ct., at 2384.

While Congress, short of outright coercion, may encourage a State to conform to federal policy choices, the residents of the State retain the ultimate decision as to whether or not the State will comply. New York v. United States, supra, 505 U.S. at 167-68. Both methods of federal encouragement blessed in New York -- "the carrot of conditional spending grants and the stick of preemption threats" -- preserves political accountability by permitting a State to reject participation in the federal initiative. See Koog v. United States, supra, 79 F.3d at 456. When the residents of a State decline a federal grant or choose not to regulate a particular activity despite a preemption threat,

Congress is forced to act for itself and thus to "bear the expense of a federally mandated regulatory program." New York v. United States, supra, 505 U.S. at 168. Because sections 434 and 642 amount "effectively to forced legislation, and this violates one of the most important of all principles of federalism, it does not matter 'how powerful the federal interest involved', nor how much the intrusion may be downplayed." Koog v. United States, supra, 79 F.3d at 462, citing New York v. United States, supra, 505 U.S. at 178. The Court in New York "provided for no de minimus exception." Printz v. United States, supra, 854 F.Supp., at 1517.

Congress's bypass of the executive and legislative processes here constitutes a greater intrusion than forcing the enactment of legislation because it invades the sovereignty of State and local governments, without even a pretext of a federal incentive or consent by the States' residents. If Congress has the power here asserted, it would never have to encourage States to adopt legislation because it could simply "eliminate the middle man" and pass federal legislation which directly enlists State and local employees to carry out the desired policies of the federal government, if they so choose.

This congressionally-imposed displacement of the policy choices of the local electorate demonstrates a lack of respect for the local political process and diminishes the dignity of State sovereignty. The very principle of State sovereignty is that local government will be more sensitive and responsive to the particular needs of its community. See Gregory v. Ashcroft, 501 U.S. 452, 457-58 (1991). As such, policy decisions are to be carried out according to the dictates of local government rather than those of the federal

government. It is the ability to reject the role envisioned for them by Congress that enables the States and their political subdivisions to maintain control over their policies. See New York v. United States, supra, 505 U.S., at 168; Koog v. United States, supra, 79 F.3d, at 456.

The elected officials of the City of New York will bear the brunt of public disapproval for the consequences of the federally-imposed policy, notwithstanding that Congress has stripped them of their ability to implement the policy embodied in Executive Order No. 124 according to the views of their constituents. Members of Congress may insulate themselves from the electoral ramifications of their decision, while taking credit for increased statistics on deported immigrants without having to ask their constituents to pay for the salaries of the conscripted State and local employees through higher federal taxes.

It has never been in dispute in this litigation, as noted above, that this federal policy undermines the City's ability to carry out its police power functions in heatlh and welfare. If the Second Circuit's conclusion is upheld, it would be inconsistent with the Tenth Amendment's guarantee.

CONCLUSION

FOR THE FOREGOING REASONS, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

New York, New York
August 10, 1999

Respectfully submitted,

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